Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1994

ALMA TORREBLANCA DE AGUILAR, ET AL.,
Petitioners,

v.

THE BOEING COMPANY, ET AL.,
Respondent.

Appendices To Petition For Writ of Certiorari

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA de AQUILAR, et al.
Plaintiffs,
VS.

THE BOEING COMPANY, et al.
Defendants.

Memorandum Opinion and Orders Denying Motions to Remand and Motion to Strike Third Party Complaint or Alternatively Sever Third Party Action

The Plaintiffs have filed a motion to remand, a supplemental motion to remand, and a motion to strike third party complaint or alternatively sever third party action. After reviewing the motions, the responses, the pleadings of record and attached affidavits, the court is of the opinion that the motions should be **DENIED**.

BACKGROUND

On March 31, 1986 a Mexicana Airlines passenger jet crashed shortly after

takeoff from a Mexico City airport. The crew and all passengers aboard the plane were killed. An investigation conducted by the Mexican government concluded that a tire explosion in the aircraft's wheel well resulted in an in-flight fire that disabled critical aircraft systems and caused the airplane to explode in flight.

Following the crash, relatives of Mexican citizens who perished in the crash filed several different lawsuits in several different state and federal courts in the United States, as well as Mexico. In each lawsuit filed in the United States, the action was either voluntarily dismissed by the plaintiffs, dismissed on the basis of foreign sovereign immunity, or dismissed on the basis of *forum non conveniens*. In fact, a similar lawsuit involving these same defendants and many of the same plaintiffs, was dismissed last

year on the basis of *direct estoppel and forum non conveniens* by the Honorable Howell Cobb, also of the Eastern District of Texas. Torreblanca De Aguilar v. Boeing Co., 806 F. Supp. 139 (E.D. Tex. 1992).

On November 5, 1992 relatives of some of the Mexican citizens who perished in the crash (hereinafter "Plaintiffs") filed this lawsuit in the 60th District Court of Jefferson County, Texas. The original petition in state court alleges negligence and product liability claims on behalf of Plaintiffs as personal representatives of the estates or as the legal heirs of the decedents pursuant to the Texas Survival Statute, TEX. CIV. PRAC. & REM. CODE ANN. §71.021 (Vernon 1992). The petition charges acts of negligence and claims of product liability against The Boeing Company, The B.F. Goodrich Company, The

Goodyear Tire and Rubber Company, Delta Air Lines, Inc., and Parker Hannifin Corporation (hereinafter "Defendants"). The petition, in an apparent attempt to defeat diversity jurisdiction, also alleges that Plaintiffs do not seek to recover more than $50,000 per decedent.

Defendants removed the lawsuit to this Court. Defendants allege that after conducting an investigation of Plaintiffs' purported damages limitation, they have determined that not all indispensable parties are included as plaintiffs. Thus, Defendants allege the purported limitation is ineffective and cannot defeat diversity jurisdiction.

Plaintiffs then filed their motion to remand. Plaintiffs claim that the damages limitation set forth in their petition limits, to a legal certainty, the amount in controversy to less than $50,000.

Plaintiffs also claim that whether they are the legal representatives of the estates of the decedents or the legal heirs entitled to bring these causes of action and limit the amount of damages sought, the case can and should be litigated in state court.

Boeing subsequently filed a third-party complaint against Mexicana Airlines. The third-party complaint alleges that any injuries or damages suffered by Plaintiffs were caused by the acts or omissions of Mexicana. Boeing claims that Mexicana is required to indemnify Boeing from and against any judgment arising out of Plaintiffs' claims against Boeing. Because Mexicana was owned by the government of Mexico, Boeing argues that this third-party complaint, independent of any diversity of citizenship argument, gives the court jurisdiction over this

lawsuit pursuant to the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U.S.C. §§1330, 1332, 1391(f), 1441(d), and 1602-1611. Mexicana has answered the third party complaint, denying any liability and opposing Plaintiffs' motion to remand on the same basis of jurisdiction under the FSIA asserted by Boeing. Plaintiffs were then granted leave to file a supplemental motion to remand. In the supplemental motion to remand, Plaintiffs included an affidavit signed by their Mexican attorney wherein she states, without further proof, that each plaintiff is "an heir at law and/or personal representative of the respective decedents" and that she has been given explicit authority to limit their damages to $50,000. Plaintiffs have also moved to strike Boeing's third-party complaint alleging that the only reason

Boeing has filed a claim against Mexicana is to prevent the lawsuit from being remanded. Plaintiffs have moved in the alternative for a severance of the third-party claim.

ANALYSIS

I. **Establishing Federal Jurisdiction**

The burden of establishing that federal jurisdiction exists rests upon the party seeking to invoke it. Gaitor v. Peninsular & Occidental Steamship Company, 287 F.2d 252 (5th Cir. 1961) citing Carson v. Dunham, 121 U.S. 421, 7 S.Ct. 1030, 30 L.Ed. 992 (1887). To invoke the diversity jurisdiction of this court, it must be shown that the matter in controversy exceeds $50,000 and is between citizens of a state and citizens or subjects of a foreign state. 28 U.S.C. §1332(a)(2). There is no dispute that complete diversity exists here. However, there has

been much dispute over the amount in controversy. As the removing parties, Defendants bear the burden of showing that federal jurisdiction exists and must establish that the amount in controversy exceeds $50,000. Id. at 253.

II. Legal Certainty Test

The "legal certainty" test governs questions of jurisdictional amount. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845, 848 (1983). Exactly what a removing party must establish to a "legal certainty" to discharge its burden is unclear in the Fifth Circuit. A test was announced in Kliebert v. Upjohn Co., 915 F.2d 142, 146-47 (5th Cir. 1990), opinion vacated on grant of reh'g en banc, 923 F.2d 47 (5th Cir.), dism'd per settlement, 947 F.2d 736 (5th Cir. 1991). If it had not been vacated, the panel decision in Kliebert

would have required Defendants to establish to a legal certainty that a successful plaintiff would "recover at least the minimum jurisdictional amount." Id. However, a more relaxed standard, one used by Judge Cobb in denying a motion to remand in an earlier lawsuit concerning this same crash, only requires Defendants to prove that there is not a legal certainty that the claim is actually below the jurisdictional amount. See De Aguilar v. Boeing Co., 790 F. Supp. 693, 694 (E.D. Tex. 1992) (hereinafter De Aguilar I"). In other words, the removing defendant must establish that there is some possibility that the plaintiff could recover over $50,000. Apparently, this is the rule in the Fifth Circuit. Foret v. Southern Farm Bureau Life Insurance Co., 918 F.2d 534, 537 (5th Cir. 1990).

III. Amount in Controversy

Defendants argue that there is certainly a possibility that Plaintiffs could recover over $50,000 for a wrongful death cause of action. Defendants content that Plaintiffs' damages limitation is ineffective and therefore the court should look to the recovery of typical wrongful death actions in order to determine the amount in controversy. Defendants point to Judge Cobb's ruling, in the earlier-mentioned denial of a motion to remand in De Aguilar I, in support of their contention that the amount in controversy is indeed to a legal certainty not less than $50,000. Judge Cobb, by looking to damage awards in similar cases, determined that these same plaintiffs were likely to recover more than $50,000 each if they recovered at all. De Aguilar I, 790 F. Supp. at 695.

Plaintiffs argue that they are the

masters of their own pleadings and can determine the amount of damages they seek to recover. They argue that the attorney/client relationship controls whether Plaintiffs are bound by their petition and their attorneys' affidavits which state that Plaintiffs seek to recover less than $50,000. Plaintiffs also argue that Defendants have waived their ability to challenge Plaintiffs' authority to bring suit as personal representatives of the decedents' estate because they have not contested Plaintiffs' authority by a verified denial or plea in abatement as required by the Texas Rules of Civil Procedure. Finally, Plaintiffs contend that under Mexican law they are entitled as lawful heirs of the decedents to pursue these claims directly and have the authority to limit the damages sought by the decedent's estates

to $50,000.

The Court initially observes that generally speaking plaintiffs are the masters of their own pleadings and may determine how much money they seek to recover in a lawsuit. Recognizing this general rule, the Supreme Court has stated that plaintiffs may prevent removal by "resort to the expedient of suing for less than the jurisdictional amount." St. Paul Mercury Indemnity Co., 303 U.S. at 294, 58 S.Ct. at 584, 82 L.Ed. at 851. However, this court recognizes that in order for Plaintiffs to effectively limit their damages they must have the right or authority to bring suit on behalf of the decedents' estates. Thus, the controlling issue is whether Plaintiffs are the legal representatives or the legal heirs entitled to bring suit on behalf of each decedent's estate and to bind the estate

by limiting damages.

A. Defendants Have Not Waived Their Ability To Challenge Plaintiffs' Authority To Bring Suit As Personal Representatives

Plaintiffs apparently contend that they bring this lawsuit as both personal representatives and as legal heirs. In a memorandum in support of the motion to remand Plaintiffs allege, "[I]n this case, the survival actions were brought by the heirs of decedents." (Plaintiffs' Memorandum In Support of Motion to Remand, p. 11). However, in the same paragraph, Plaintiffs also argue that Defendants have waived their ability to challenge Plaintiffs' authority to bring suit as personal representatives of the decedent's estates. Plaintiffs apparently argue that under the Texas Rules of Civil Procedure one who purports to be suing as a personal representative need not prove his

authority unless challenged by a plea in abatement or verified denial. It is Plaintiffs' position that because Defendants have not filed a plea in abatement or verified denial in this case they have waived their ability to attack the validity of Plaintiffs' authority as personal representatives.

Under the Texas Rules of Civil Procedure, a pleading setting up the matter that the plaintiff does not have the legal capacity to sue must be verified. TEX. R. CIV. P. 93(1); See Theobold v. Pate, 542 S.W.2d 460, 464-65 (Tex. Civ. App. -- Tyler, 1976, writ dism'd w.o.j.). In Johnson v. Holly Farms of Texas, Inc., 731 S.W.2d 641, 647 (Tex. App. -- Amarillo 1987, no writ), the Amarillo Court of Appeals ruled that plaintiffs suing under the Texas Survival Statute are not required to prove their

authority to sue as personal representatives unless challenged by a plea in abatement or verified denial. The Federal Rules of Civil Procedure do not require the verification of the denial of a plaintiff's capacity to sue. The Federal Rules have eliminated any need to verify any pleadings, requiring only that the attorney sign his name to submitted pleadings. FED. R. CIV. P. 11. The court must determine, under the Erie doctrine, if the verified denial required under Texas law to contest Plaintiffs' authority to sue is a substantive right requiring compliance by Defendants or if the Federal Rules control the pleading requirements in this case.

This court ruled on a similar Erie doctrine issued in Sneed Shipbuilding, Inc. v. Spanier Marine Corp., 125 F.R.D. 438 (E.D. Tex. 1989). In Sneed

Shipbuilding, the court restated the rule handed down by the Supreme Court in Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965), "[I]f the rules do conflict, Hanna mandates that the federal rule be applied, even if it changes the outcome, as long as the federal rule is valid in light of due process and the Rules Enabling Act." The court then determined that Federal Rule 11 did not violate due process or the Rules Enabling Act and was to be applied in pleadings situations where the conflicting Texas procedural rules were Texas Rules of Civil Procedure 93(10) and 185. Id. at 444.

The case now before the court is similar. The "right" in question in this case seems to be the right on the plaintiff's part to have the defendant swear to his pleading that disputes the plaintiff's authority to sue as a personal

representative. Without repeating the analysis of Sneed Shipbuilding, the court finds that Defendants are only required to comply with federal pleading requirements and do not need to challenge Plaintiffs' authority to sue as personal representatives by a verified denial or a plea in abatement.

Plaintiffs have offered no proof, other than their Mexican attorney's affidavit, that they are the personal representatives of the respective estates. The court therefore cannot conclude that there is no possibility that the decedents' estates could recover more than $50,000.

B. **Authority of Plaintiffs as Legal Heirs to Limit Damages Sought on Behalf of the Estate**

Plaintiffs contend that under Mexican Law they are entitled as lawful heirs of the decedents to pursue these claims and

have the authority to limit the damages sought by the decedent's estates to $50,000. Defendants allege that under Texas law all potential legal heirs to an estate are indispensable parties to a survival cause of action involving that decedent's estate. Defendants argue that because not all legal heirs are parties to this lawsuit, the damages limitation is ineffective and cannot defeat diversity jurisdiction. To resolve this issue, the court must determine whether Texas or Mexican law should control the extent of a legal heir's authority when bringing a claim on the behalf of a decedent's estate.

"In a diversity action in federal court, a district court is required to follow the choice of law rules of the state in which it sits." Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 249

(5th Cir. 1990) [citing Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941)]. Under Texas law, "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984). Thus, it is necessary for the court to determine whether Texas or Mexico has the most significant relationship to the ability and authority of a legal heir to sue on behalf of an estate seeking to recover under the Texas Survival Statute.

In applying the most significant relationship test, the court must identify the relevant state contacts. The

following contacts in the state of Texas are present in this case: all defendants conduct business and are amenable to process, the forum providing the legal basis for the cause of action being brought by Plaintiffs is Texas, and the Texas courts system is being utilized to pursue these claims. The following contacts in Mexico are present in this case: all plaintiffs are from Mexico, all decedents were from Mexico, and the crash occurred in Mexico.

"The application of the most significant relationship approach to the resolution of choice of law questions does not turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6 [of the Restatement]." Mitchell, 913 F.2d at 249 [citing Gutierrez v. Collins, 583

S.W.2d 312, 318 (Tex. 1979)].[1] Therefore, after identifying the states with relevant contacts, the court must identify the policies or governmental interests of each state in the controversy in question. Id.

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[1]Section 6 of the Restatement (Second) of Conflict of Laws provides,

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

In its analysis, the court confines itself to the issue of whether Texas or Mexican law should govern the authority of a legal heir when that heir is attempting to prosecute a survival claim on behalf of a decedent's estate. Given the fact that this case is brought in the state of Texas of foreign plaintiffs seeking to take advantage of the Texas Wrongful Death Statute, the court finds it hard to conceive of any overriding interest in applying Mexican law. On the other hand, there are several significant reasons for applying Texas law.

Texas certainly has an interest in requiring that those seeking to assert claims in its courts meet certain requirements before asserting those claims. For instance, in situations such as this, the courts would spend an inordinate amount of time trying to

determine a foreign country's laws regarding who has the authority to prosecute suits on behalf of an estate. Such an undertaking would be difficult and time-consuming. Requiring compliance with Texas law certainly promotes the efficiency of Texas courts in these matters. Further, it promotes the uniformity, predictability, and certainty of decisions dictating who has the authority to bring these causes of action and how they must bring them. Based upon these factors, the court believes that Texas courts would choose to apply Texas law.

In order to prosecute a survival cause of action on behalf of an estate as a legal heir, a plaintiff must establish three things under Texas law. The plaintiff must allege (1) that no administration of the estate is pending,

(2) that no administration is necessary, and (3) that the plaintiff is the sole owner of the claim for damages which survived to the decedent's heirs, legal representatives and estate. See Lozano v. Smith, 718 F.2d 756, 773, n. 38 (5th Cir. 1983). Plaintiffs have alleged none of these elements.

The court notes that even if it were proper to apply Mexican law, Plaintiffs have failed to provide any support for their allegation that under Mexican law they would have the authority to pursue these claims and limit the damages sought to be recovered. While the court was unable to uncover much relevant Mexican law, it did research the statutes cited by Plaintiffs in a memorandum to the court. Plaintiffs cited the "Civil Code of Federal District arts. 1281-1294, 1599-1791" for the proposition that these heirs

could make and prosecute these claims directly on behalf of the estate. The only relevant article in the Mexican Civil Code the court could find, in the wide array of statutes cited by Plaintiffs, was Article 1289 which reads, "[e]ach heir may dispose of the right which he has in the estate; but he cannot dispose of the things which constitute the estate." The court was not provided with or able to find any case law interpreting this provision, but the last half of Article 1289 may prevent Plaintiffs from binding an estate to a compromise without including all other persons who have an interest in the estate. Therefore, the court finds that Plaintiffs would be precluded from making a binding damages limitation under Mexican law.

CONCLUSION

The court finds that under Texas law

Plaintiffs have not shown they have the authority to limit the damages sought to be recovered by the estates in this lawsuit. Further, even if Mexican law controlled the question of Plaintiffs' authority to limit damages, these plaintiffs have not shown they have the authority. Therefore, the court finds that the amount in controversy exceeded $50,000 at the time this lawsuit was removed and this court has jurisdiction.

IT IS, therefore, ORDERED that Plaintiffs' motion to remand are **DENIED**.

IT IS further ORDERED that Plaintiffs' motion to strike Boeing's third-party complaint, on the basis of fraudulent joinder to create federal jurisdiction, and in the alternative to sever the third-party complaint, in order to remand the main action, should also be **DENIED**.

SIGNED this the 8th of June 1993.

/s/

Richard A. Schell
United States District Judge

APPENDIX B

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON FORUM NON CONVENIENS

CAME ON TO BE CONSIDERED Defendant The Boeing Company's motion for summary judgment and motion to dismiss on the basis of forum non conveniens, which are joined in by all other defendants and the third-party defendant. After reviewing the motions, the lack of response in opposition, and the pleadings of record, the court is of the opinion that the Defendants' motion to dismiss should be **GRANTED** and, therefore, the court does not reach Defendants' motion for summary judgment.

On June 8, 1993 this court denied Plaintiffs' motion to remand this case to Texas state court. On July 8, 1993 Boeing filed a motion for summary judgment based on limitations and in the alternative a

motion to dismiss Plaintiffs' claim based on forum non conveniens. Shortly thereafter, all other defendants, Delta Air Lines, Inc., the Goodyear Tire and Rubber Company, the B.F. Goodrich Company, Parker Hannifin Corporation, as well as the third-party defendant, Compania Mexicana de Aviacion, S.A., d/b/a Mexicana Airlines, joined in Boeing's motions.

IT IS, therefore, ORDERED that Defendants' Motion to Dismiss on the grounds of forum non conveniens is GRANTED, and this action is **DISMISSED** at Plaintiffs' cost.

SIGNED this the 11th day of August, 1993.

/S/
Richard A. Schell
United States District Judge

APPENDIX C

IN THE UNITED STATES OF COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5333

ALMA TORREBLANCA DE AGUILAR, et al.,
Plaintiffs-Appellants,

VERSUS

BOEING COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States
District Court
for the Eastern District of Texas

Before SMITH and EMILIO M. GARZA, Circuit Judge, and STAGG,[2] District Judge.

JERRY E. SMITH, Circuit Judge:

Plaintiffs, the relatives of persons who died in an airline crash in Mexico, appeal the district court's denial of

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1District Judge of the Western District of Louisiana, sitting by designation.

their motion to remand to state court, the failure of the district court to strike or sever the third party complaint by defendant Boeing Company ("Boeing"), and the dismissal on the ground of forum non conveniens ("f.n.c."). Concluding that the district court did not err, we affirm.

I.

On March 31, 1986, a Mexicana Airlines jet crashed near Mexico City, killing everyone on board. An investigation concluded that a tire exploded in the wheel well while the plane was in flight, causing an in-flight fire that eventually caused the plane to explode.

II.

Relatives and personal representatives of the estates of those who died filed several lawsuits throughout the United States and in Mexico. In every

lawsuit filed in the United States, the action has been either voluntarily dismissed by the plaintiffs or dismissed on the basis of foreign sovereign immunity or f.n.c.[3]

Plaintiffs have been determined to find a United States forum in which to try their case. In November 1992, they filed this action in Texas state court, claiming to be the personal representatives of the estates of each decedent and the legal heirs of the decedents pursuant to the Texas Survival Statute, TEX. CIV. PRAC. & REM. CODE ANN. §71.021 (Vernon 1986). The

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[3]See de Aguilar v. Boeing, Co., 11 F.3d 55 (5th Cir., 1993); Compania Mexicana de Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988); Rodriguez v. Mexicana de Avion, S.A., (W.D. Tex. 1987), aff'd mem., 843 F.2d 498 (5th Cir.), cert. denied, 488 U.S. 826 (1988); Wolf v. Boeing Co., 810 P.2d 943 (Wash. App.), review denied, 818 P.2d 1098 (Wash. 1991).

plaintiffs charged negligence and products liability against Boeing, B.F. Goodrich, Goodyear Tire and Rubber, Delta Airlines, and Parker Hannifin Corporation. Under TEX. R. CIV. P. 47, plaintiffs were not allowed to plead for a specific amount of damages.[4]

After defendants removed the case to federal court in the Eastern District of Texas, plaintiffs filed affidavits executed by certain plaintiffs and by the plaintiffs' attorneys, purporting to limit the damages they were seeking, and moved to remand on the ground that the $50,000 jurisdictional amount requirement was not satisfied. See 28 U.S.C. §1332. The district court denied remand, holding that

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[4]The rule states, "An original pleading. . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court."

the affidavits were irrelevant because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." De Aguilar v. Boeing Co., 790 F. Supp. 693, 694 (E.D. Tex. 1992). Subsequently, however, this court decided Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A. ("ANPAC"), 988 F.2d 559 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994), concluding that post-removal affidavits sometimes can be relevant where the jurisdictional amount question is unresolved. Id. at 565.

The district court a quo further noted that, even if it had considered the affidavits relevant, the complaint named one hundred unknown plaintiffs who were not bound by the affidavits, and plaintiffs' counsel could not bind minor beneficiaries (constituting approximately

twenty of the named plaintiffs) to judgments in wrongful death suits without leave of court. De Aguilar, 790 F. Supp. 695. The claims later were dismissed on f.n.c. grounds. De Aguilar v. Boeing Co., 806 F. Supp. 139 (E.D. Tex. 1992). The Court held that direct estopped barred the plaintiffs from relitigating the f.n.c. dismissal. Courts in Illinois, Washington, and the Western District of Texas had already ruled on this matter. Id. at 142. Alternatively, the court found that under traditional f.n.c. criteria, the Eastern District of Texas would not be a convenient forum. Id. at 142-43.

This court affirmed the denial of the motion to remand and the dismissal on estopped and f.n.c. grounds. De Aguilar v. Boeing Co. ("De Aguilar I"), 11 F.3d 55 (5th Cir. 1993). We held that the

district court had properly disregarded the affidavits because it was "facility apparent" that the damages sought by each plaintiff exceeded $50,000. Id. at 57. Alternatively, we noted that the attorney affidavits were not unrebutted by evidence from the defendants. Id. at 57-58. These points distinguished De Aguilar I from ANPAC.

ANPAC involved claims that were not facially likely to exceed the jurisdictional amount. ANPAC, 988 F.2d at 565. In addition, in ANPAC, the only "evidence" the defendants produced to rebut the plaintiffs' attorneys' affidavits was the original notice of removal, which merely stated that the matter in controversy exceeded $50,000. Id. The De Aguilar I court noted that the defendants in that case had produced testimonial evidence and published

precedent that indicated that the matter in controversy indeed exceeded $50,000. De Aguilar I, 11 F.3d at 58.

In the alternative, the plaintiffs in De Aguilar I argued that the original notice of removal was invalid because the defendants failed to prove that the amount in controversy exceeded $50,000. We rejected this argument because defendants had shown that plaintiffs had pled damages of up to $5,000,000 in other fora for the same injuries. Id.

In the instant case, shortly after the district court had dismissed the original claims, plaintiffs' attorneys filed another petition in state court. In this petition, at issue now, the plaintiffs dropped forty-two of the heirs, including all of the minors, and any mention of unnamed "Doe" plaintiffs. More importantly, plaintiffs, in apparent

violation of TEX. R. CIV. P. 47, described the amount of their claim by specifically alleging that their damages did not exceed $50,000. Plaintiffs attached to the original petition an affidavit of attorney Dennis Reich stating that plaintiffs had agreed to an irrevocable cap on the amount of damages that could be awarded.

After service, defendants attempted to clarify whether Reich's affidavit constituted a binding limitation on the respective estates' damages. Howard Close, counsel for Boeing, sent Reich a letter asking for an amendment to the affidavit, or a new affidavit, in which Reich would attest that the plaintiffs had been appointed the personal representatives of the estates and had expressly authorized Reich to make a binding and irrevocable admission on their behalf.

One of the plaintiffs' attorneys, Mitchell Toup, had a discussion with Close about the proposed amendments to Reich's affidavit. The parties appear to dispute exactly what took place, though both sides agree that plaintiffs' counsel refused to say that the plaintiffs had been appointed by a qualified court as the personal representatives of the estates. According to defendants, Toups also said that none of the plaintiffs' American attorneys had actually talked to the plaintiffs. Plaintiffs claim that the reason they refused to acknowledge that they had been appointed the personal representatives of the estates was that they were suing as heirs, not representatives.

Defendants concluded that the plaintiffs named in the petition were simply <u>some</u> of the heirs of the decedents and did not have the authority to limit

damages. As a result, defendants once again removed to federal court in the Eastern District of Texas, establishing in their notice of removal that the amount in controversy exceeded $50,000.

Three months after removal, plaintiffs filed a supplemental motion to remand for lack of jurisdiction and attached an affidavit from a Mexican lawyer, Guadalupe Bistrain, who was one of the plaintiffs' attorneys. Bistrain swore that she had received explicit authority from each of the named plaintiffs to limit damages to $50,000. The district court determined that the plaintiffs had not shown the necessary authority to limit damages and ruled that the amount in controversy exceeded $50,000.

Defendants alleged an additional basis for federal jurisdiction. In December 1992, Boeing filed a third party

complaint against Mexicana Airlines, which on January 15, 1993, filed a memorandum that claimed status as a "foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611. Plaintiffs filed a motion to strike or, in the alternative, sever Boeing's third party claim. The district court denied this motion when it denied the motion to remand. Defendants subsequently moved to dismiss on f.n.c. grounds; the court granted this motion.[5]

III.

Since the crash, plaintiffs have made repeated attempts to locate an American forum. There are actions pending in the

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[5]There is no merit to the plaintiffs' appeal of the f.n.c. dismissal. We affirmed, in de Aguilar I, 11 F.3d at 58-59, the dismissal on f.n.c. grounds. Thus, if we decide that there was federal jurisdiction in this case, the f.n.c. dismissal is law of the case.

Mexican courts also. The Supreme Court of Texas had held that the doctrine of f.n.c. no longer applied in Texas wrongful death actions. See Dow Chemical Co. v. Alfaro, 786 S.W. 2d 674 (Tex. 1990), cert denied, 498 U.S. 1024 (1991). The Texas Legislature then overruled Alfaro. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051; "21" Int'l Holdings v. Westinghouse, 856 S.W. 2d 479 (Tex. App. - San Antonio 1993, no writ). The new statute, however, applied only to causes of action filed on or after September 1, 1993. Thus, plaintiffs obviously prefer Texas state court to federal court, where f.n.c. applies.

IV.

As we have stated, plaintiffs' state court petition averred that they were seeking no recovery in excess of $50,000. During oral argument, plaintiffs

characterized their claim as a plea for a specific amount of damages. They argue that De Aguilar I was premised on the fact that the complaint in that case "did not specify an amount of damages." De Aguilar I, 11 F. 3d at 57.

Indeed, strictly speaking, plaintiffs have not alleged a specific amount of damages, as the amount they claim can range from $1 to $50,000. We will treat the claim, however, as one for a specific amount of damages.[6] Plaintiffs have labored to specify one "magic" number in their complaint, i.e. $50,000. We regard such a complaint as more like a claim for one sum rather than a claim for an unlimited or an unspecified amount of damages; to reason otherwise would put form over substance. As a functional

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[6]This critical distinction renders ANPAC inopposite.

matter, plaintiffs are attempting to avoid federal jurisdiction. This goal is the same whether they pick a number such as $49,999 or merely announce a ceiling that, conveniently, is barely within the statutory limit.

Defendants, as on all previous occasions, seek to retain this case in federal court. In general, defendants may remove a civil action if a federal court would have had original jurisdiction. See 28 U.S.C. § 1441(a). In this particular case, jurisdiction is asserted on the basis of diversity of citizenship. 28 U.S.C. § 1332. The removing party bears the burden of establishing that federal jurisdiction exits. Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 253-54 (5th Cir. 1961).

"Unless the law gives a different rule, the sum claimed by the plaintiff

controls if the claim is apparently made in good faith." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). Most discussions of jurisdictional amount in removal cases begin with St. Paul Mercury.

In St. Paul Mercury, the Court announced the now famous "legal certainty" test for diversity cases: In order for a federal court to decline jurisdiction, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount." Id. at 289. Many courts have applied the "legal certainty" language to jurisdictional amount questions in remand cases;[7] there is, however, disagreement as to exactly what a plaintiff has to show to a legal certainty

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[7] E.g., Hale v. Billups, Inc., 610 F. Supp. 162, 164 (M.D. La. 1985); Locklear v. State Farm Mutual Auto Ins. Co., 742 F. Supp. 679 (S.D. Ga. 1989).

to defeat federal jurisdiction.

In St. Paul Mercury, the plaintiff originally alleged damages above the jurisdictional amount in state court but amended the complaint in federal court to state less than the required amount. The Court held that the subsequent amendment could not strip the federal court of jurisdiction, provided that the original claim for damages was made in good faith. The "legal certainty" test was articulated in the Court's more general discussion of jurisdiction:

> The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rules, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a

> legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of the suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.

Id. at 288-90 (footnotes omitted).

The above discussion and, hence, the legal certainty test, contemplate the

"typical" diversity situation.[8] As one court has indicated, the legal certainty test "is explicitly premised on the assumption that the amount in controversy is met by the express allegations of the plaintiff's complaint and is limited in utility to cases in which the plaintiff himself has placed the requisite jurisdictional amount in controversy by requesting damages in excess of the jurisdictional amount." Garza v. Bettcher Indus., Inc., 752 F. Supp. 753, 755 (E.D. Mich. 1990).

This court has indicated that the legal certainty test does not apply in a remand situation where the plaintiff has alleged an indeterminate amount of damages. In De Aguilar I, we stated that

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[8]In a typical diversity situation, the plaintiff files a suit in federal court alleging damages in excess of the jurisdictional amount.

"[w]hen the plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $50,000." 11 F.3d at 58 (citing Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992); Garza, 752 F. Supp. at 763). See also Burns v. Windsor Ins. Co., 31 F.3d 1092., 1094 (11th Cir. 1994) (noting that in the "typical" removal case "defendant can remove to federal court if he can show, by a preponderance of the evidence, facts supporting jurisdiction").

The question in this case is different from that in both the typical diversity situation and the typical removal situation. Here, the plaintiffs, in a bold effort to avoid federal court, have specifically alleged that their respective damages will not exceed the

jurisdiction amount.

Plaintiffs have correctly cited the provision in St. Paul Mercury that a plaintiff who does not "desire to try his case in federal court . . . may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." 303 U.S. at 294. The inquiry, however, does not end merely because the plaintiff alleges damages below the threshold. The face of the plaintiff's pleading will not control if made in bad faith.

Moreover, the above statement from St. Paul Mercury plainly was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint. So, for example, in Woods v. Massachusetts Protective Ass'n, 34 F.2d

501 (E.D. Ky. 1929), cited in St. Paul Mercury in support of the above-quoted passage, the plaintiff sued for an amount under the jurisdiction limit. Under the state provision in that case, "if there had been no removal and an answer had been filed, plaintiff would not have been entitled to judgment for more than [the amount for which plaintiff sued]." Id. at 504.[9]

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[9]See also Iowa Cent. Ryu. v. Bacon, 236 U.S. 305, 309 (1915) (state pleading for less than jurisdictional amount approved where "[t]he state court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action"); Harley v. Firemen's Fund Ins. Co., 245 F. 471, 476 (W.D. Wash. 1913) (noting that "the initial pleading, and the only pleading filed in the state court. . . fixes the amount in controversy in this case at [an amount below the jurisdictional amount] and no greater sum can be recovered"); Maine v. Gilman, 11 F. 214, 215 (C.C.D. Me. 1882) ("In the mode of pleading adopted in Maine the ad damnum binds the plaintiff as a maximum, and a judgment for more is erroneous, or, at

The majority of states now, however, have followed the example of FED. R. CIV. P. 54(c) and do not limit damages awards to the amount specified in the ad damnum clause of the state pleading. See Burns, 31 F.3d at 1097 n.11. In fact, many states, like Texas, have enacted rules that strictly prohibit plaintiffs from pleading for specific amounts in cases of unliquidated damages.

These new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is

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least, if not technically erroneous would be irregular and improper."); 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.157[6], at 133-34 (2D ed. 1993) (stating that plaintiff "may prevent removal by the expedient of suing for less than the jurisdictional amount unless his attempted waiver of the balance is legally ineffective").

actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith. See Boelens v. Redman Homes, Inc., 759 F.2d 504, 507 (5th Cir. 1985) (stating that "tactical manipulation [by the] plaintiff cannot . . . be condoned") (quoting Austwick v. Board of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983)). Likewise, as one treatise has indicated,

> if the prayer for relief must be ignored under applicable principles of law and plaintiff can, therefore, recover more on his state claim than the jurisdictional minimum, the case is removable; and, where plaintiff's cause of action and the relief actually sought clearly involve a controversy in excess of the required amount, removal is not defeated by a monetary prayer for less than the amount.

1A MOORE, supra, ¶0.158, at 204-05

(footnotes omitted).[10]

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[10]The Seventh Circuit has stated:

> St. Paul held that a plaintiff may not obtain a remand by amending the complaint to seek less than the jurisdictional amount. This principle has led some courts to hold that removal is proper, although the Complaint asks for less than the jurisdictional amount, when state law permits a court to award more and the court is likely to do so if it decides in the plaintiff's favor.

In re Shell Oil Co., 966 F. 2d 1130, 1131 (7th Cir. 1992) (citing Cole v. Freightliner Corp., 1991 U.S. Dist. LEXIS 3408 (N.D. Ill.); Garza; Johnson v. Core-Vent Corp., 1990 U.S. Dist. LEXIS 4225 (N.D. Ill.); Locklear v. State Farm Mut. Auto. Ins. Co., 742 F. Supp. 281 (S.D. Ala. 1989); Corwin Jeep Sales & Serv., Inc. v. American Motors Sales Corp., 670 F. Supp. 591 (M.D. Pa. 1986); Steele v. Underwriters Adjusting Co., 649 F. Supp. 1414 (M.D. Ala. 1986); Hale v. Billups, Inc., 610 F. Supp. 162 (M.D. La. 1985). but see Burns v. Windsor Ins. Co., 31 F. 31 F.3d 1092, 1097 (11th Cir. 1994) (stating that permitting removal where the plaintiff is not bound by his state pleading but pleads an amount of damages below the jurisdictional amount "would allow state rules of procedure to determine when federal jurisdiction existed" and "could lead to inconsistent application of federal jurisdictional rules") (footnote omitted).

Accordingly, we hold that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than the damages for which he has prayed in the state court complaint. Such a rule is necessary to avoid the sort of manipulation that has occurred in the instant case.

The exact extent of the burden on the defendant in this situation was addressed by a panel majority of this court in Kliebert v. Upjohn Co., 915 F. 2d 142, 147 (5th Cir. 1990), vacated for reh'g en banc, 923 F. 2d 47 (5th Cir.), appeal dism'd per stipulation of settlement, 947 F.2d 736 (5th Cir. 1991). Having been vacated, Kliebert is no longer precedent in this court, but its analysis is useful.

In Kliebert, the plaintiffs alleged a specific dollar amount of damages that was less than the federal jurisdiction amount. The panel majority held that to remove, the defendants would have to show that it was legally certain that plaintiffs would recover more than the jurisdictional amount. Id. at 146. Thus, the defendants would have to show that "if a jury awarded less than [the jurisdictional amount] the court would be required to grant a new trial." Id.

The onerous nature of this burden stands in direct contrast to the analysis of several district courts that have stated the removal inquiry as a type of "converse legal certainty test." Under this formulation, defendant "has the burden of proving that it does not appear to a legal certainty that the claim is actually for less than the requisite

amount." Hale, 610 F. Supp. at 164. Courts elsewhere have restated the test and required that the defendant show "'that there is a probability that the value of the matter in controversy' exceeds the jurisdictional amount." Corwin Jeep Sales, 670 F. Supp. at 595 (quoting Cunningham v. Ford Motor Co., 413 F. Supp. 1101, 1103 (D.S.C. 1976).

In the present case, the district court held that the removing defendant had to establish that there is "some possibility" that the plaintiff could recover over $50,000. This formulation is supported by language from Foret v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534, 537 (5th Cir. 1990), in which we held that it was not error for the district court to exercise jurisdiction over a case where "the plaintiffs could have recovered more than $50,000."

Both sides argue that the preponderance of the evidence standard announced in De Aguilar I should apply in this case. We agree. As the dissenting judge indicated in Kliebert, the strict test adopted by the Kliebert majority "seems to conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor 'those parties seeking to invoke the jurisdiction of a federal district court.'" Kliebert, 915 F.2d at 148 (Jolly, J., dissenting) (quoting Opelika Nursing Home v. Richardson, 448 F. 2d 658, 663 (5th Cir. 1971)).

The Kliebert standard also fails adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court

following remand. This court has spoken adamantly of "preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute." Boelens, 759 F.2d at 507.

We regard, however, the "some possibility" standard applied by the district court and the "converse legal certainty" test, which essentially require that the defendant merely show that plaintiff could recover more than the jurisdictional amount, as too permissive. See Burns, 31 F. 3d at 1092 ("The possibility that plaintiff may in the future seek or recover more damages is insufficient to support federal jurisdiction now.") (emphasis added). Plaintiff is, to some extent, still the master of his own claim. See, e.g.,

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 & n.7 (1987); 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §3702, at 22 (2d ed. 1985).

Consequently, the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount. The preponderance burden forces the defendant to do more than point to a state law that might allow the plaintiff to recover more than what is pled.[11] The defendant must produce evidence that establishes that the actual amount in controversy exceeds $50,000.

Our court has already said, in the instant case, that it is facially apparent

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[11]Such a holding would render the jurisdictional amount all but meaningless in states with rules analogous to FED. R. CIV. P. 54(c). See 14A WRIGHT, supra,

that the damages rise to a level above $50,000. De Aguilar I, 11 F.3d at 57. As a result, despite the fact that the district court imposed the wrong burden, there is no question that preponderance burden, had the district court applied it, easily would be met by these defendants. In fact, in accordance with the law of the case principle, this court is bound by what we held in De Aguilar I.

So, once a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint. Thus, once the defendant has pointed to an adequate jurisdictional amount, the situation becomes analogous to the "typical" circumstances in which the St. Paul Mercury "legal certainty" test is

applicable. The defendant has established, by a preponderance, that federal jurisdiction is warranted. At this point, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." St. Paul Mercury, 303 U.S. at 289.

We emphasize that this is not burden-shifting exercise. In light of St. Paul Mercury, plaintiff must make all information known at the time he files the complaint.

Plaintiff's "legal certainty" obligation might be met in various ways; we can only speculate, without intimating how we might rule in such case. Plaintiff's state complaint might cite, for example, to a state law that prohibits recovery of damages that exceed those requested in the ad damnum clause and that

prohibits the initial ad damnum to be increased by amendment. Absent such a statute, "[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant has removed the case, St. Paul makes later filings irrelevant." In re Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992) (per curiam).[12]

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[12]The Eleventh Circuit has expressed reluctance to allow state rules of procedure to determine when federal jurisdiction exists. See Burns, 31 F.3d at 1097. We note, however, the cases that we have cited, especially those mentioned by the St. Paul Mercury Court, which expressly reference state procedural rules in the context of removal.

Moreover, while the Eleventh Circuit fears the "inconsistent application of federal jurisdictional rules," we observe that the same "rule" will now hold throughout the circuit. The general principle is that plaintiffs will have to show that they are bound irrevocably by their state pleadings in these situations. Certainly, plaintiffs who plead for specific damages and who are in states that have procedural rules binding them to their pleadings will satisfy their burden

V.

The state complaint in this case was filed in Texas, which has the following procedural provision: "An original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court." TEX. R. CIV. P. 47(b). Plaintiffs acknowledge during oral argument that their filing violated rule 47(b). Accordingly, there is no state provision that limits the amount of damages plaintiffs are seeking, or can recover, to the amount they have asked for in the complaint, i.e., an amount not to exceed $50,000. In summary, therefore, a

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more easily. Others will have the same opportunity to avoid federal court but will have to choose another method to show their commitment to recovery below the federal threshold.

plaintiff, in a case for unliquidated damages, cannot, absent a further showing, avoid removal by pleading for damages under the jurisdictional amount where a state rule prevents such pleading and where defendants are able to show that it is facially apparent that the amount in controversy exceeds $50,000.

In the case sub judice, plaintiffs also attached to the original state court petition an attorney affidavit that purported to limit the amount of damages recoverable. The federal district court reasoned, however, that the plaintiffs could not effectively limit the amount of damages they could obtain unless they had the authority to bind the estates by limiting damages. In order to do so, they had to be the legal representatives or legal heirs of the estates.

On this issue, plaintiffs' initial

argument is that Mexican law rather than Texas law should apply. Specifically, they assert that under Mexican law, they are the lawful heirs of the decedents and have lawful authority to limit the damages sought by the estates.

In a diversity action, a federal court must apply the choice-of-law rules of the state in which it sits. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). According to Texas law, "in all choice-of-law cases, except those contract cases in which the parties have agreed to a valid choice-of-law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." Duncan v. Cessna Aircraft Co., 665 S.W. 2d 414, 421 (Tex. 1984).

Texas follows RESTATEMENT (SECOND) of CONFLICT OF LAWS §6, which provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule for law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Furthermore, section 145 lists the

factual matters that a Texas court will consider when applying section 6:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, had the most significant relationship to the occurrence and the parties under the principles stated in §6.
>
> (2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the

particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); Crisman v. Cooper Indus., 748 S.W. 2d 273, 276-77 (Tex. App. -- Dallas 1988, writ denied).

Furthermore, the application of the significant relationship test does not "turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6." Gutierrez v. Collins, 583 S.W. 2d 312, 318 (Tex. 1979).

Defendants apparently relied upon only Texas cases when arguing before the district court that Texas should apply, as plaintiffs did not argue that Mexican law should apply on this issue until they filed their motion to remand two months after removal. The district court, however, did address and reject the

choice-of-law argument in its memorandum opinion, and we follow suit.

We will first identify all relevant contacts as a Texas court would. Duncan, 665 S.W.2d at 421. All defendants conduct business in TEXAS, the forum is Texas, and the underlying cause of action is based upon Texas law. All of the plaintiffs are from Mexico, all decedents were from Mexico, and the crash itself and the injuries took place in Mexico. There is no particular relationship between the plaintiffs and the defendants.

The matter at issue is whether Texas or Mexican law will be used to determine the extent of plaintiffs' authority to limit damage recoveries for the estates. As noted, plaintiffs plainly are seeking damages under the Texas Survival Statute.

This "particular substantive issue" has nothing to do with the actual alleged

tort itself. Duncan, 665 S.W. 2d at 421 (the law of the place with the "most significant relationship to the particular substantive issue will be applied to resolve that issue"). In other words, the choice-of-law question in this case in unrelated to the conduct and injury underlying the cause of action in the same way, for example, the choice of the substantive products liability law of one of the places would be.[13] See, e.g.,

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[13]Obviously, in a tort case, the locus of the conduct has a greater interest in seeing that its standard of care is applied, because it affects the way that parties tailor their conduct in that state. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145, cmt. d, at 417-18:

> Experience and analysis have shown that certain issues that recur in tort cases are most significantly related to states with which they have particular connections or contacts. So, for example, a state has an obvious interest in regulating the conduct of persons within its territory and in providing

Perry v. Aggregate Plant Prods. Co., 786 S.W. 2d 21 (Tex. App. -- San Antonio 1990, writ denied) (products liability law of Indiana applied to conduct and injury occurring in Indiana); Crisman (products liability law of Florida applies to conduct and injury occurring in Florida).

The fact that the accident took place in Mexico, or that there was an accident at all, is fortuitous and simply not

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> redress for injuries that occurred there. Thus, subject only to rare exceptions, the local law of the state where the conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor's conduct was entitled to legal protection (see §§ 146-147).

The particular issue in our case is more akin to the situation where "a court under traditional and prevailing practice applies its own state's rules to issue involving process, pleadings, joinder of parties, and the administration of the trial. . . " Id. at 417.

relevant to our particular choice-of-law decision. Rather, the important fact is that the plaintiffs chose to file a suit in Texas under Texas law. Whether the plaintiffs could effectively limit the damage recovery to the estates of the decedents relates more directly to the "procedural" aspects of the suit and not to be substantive portions of the cause of action.[14]

Mexican has no underlying interest in the application of its law to determine who can bring a cause of action or bind the estate in a Texas cause of action. Texas certainly has an interest in requiring those who seek to take advantage of Texas law to meet certain requirements. In addition, uniformity and predictability

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[14]Strictly speaking, this not a procedural issue; otherwise, the federal procedure rules would apply.

in Texas courts would be promoted when deciding who has the authority to pursue actions on behalf of estates. This is a false conflict, and Texas law applies. See Duncan, 665 S.W. 2d at 422. In this situation, we have no doubt that a Texas court would choose to apply Texas law.

Plaintiffs originally claimed to be the personal representatives and legal heirs of the decedents' estates. Boeing's attempt to amend the Reich affidavit, and the conversations which followed, however, have called this claim into substantial doubt. In fact, plaintiffs appear essentially to have abandoned their claim as personal representatives and instead purport to be plaintiffs' legal heirs.

The plaintiffs can pursue their claims as the individual heirs of the estates under TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon's 1986). Legal

heirs can sue on behalf of an estate if they allege that "there is no administration [of the estate] pending and no necessity for same and that they are the only heirs (or devisees) of the deceased." Lozano v. Smith, 718 F. 2d 756, 773 n. 38 (5th Cir. 1983); see also Frazier v. Wynn, 472 S.W. 2d 750, 752 (Tex. 1971); Johnson v. Holly Farms, Inc., 731 S.W. 2d 641, 647 (Tex. App. -- Amarillo 1987, no writ).

Plaintiffs have not alleged any of these elements. They now argue that the district court erred in not requiring the defendants to offer evidence that the above elements could not be satisfied. Plainly, though, the rule is that the plaintiffs must affirmatively allege the above elements. See Johnson, 731 S.W. 2d at 647.

In any event, defendants did offer

evidence that the plaintiffs in this case are not the sole heirs. Forty-two persons alleged in De Aguilar I to be heirs of the decedents, as well as twenty minors, were dropped as plaintiffs. It appears that known heirs were deleted from this case because plaintiffs knew that they would not be able to limit the damage claim with these heirs as part of the action.[15] The one hundred "Doe" plaintiffs from the first action were also eliminated. The inclusion of "Doe" plaintiffs in De Aguilar I suggests that the plaintiffs' attorneys were not aware of who all of the heirs were, and the plaintiffs have contended nothing that appears to change this circumstance.

In fact, plaintiffs' attorney

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[15]For example, a court must approve the limiting of a claim when minors are involved.

acknowledged at oral argument that he does not represent all of the legal heirs. Defendant also argue that in a previous complaint, all of the present plaintiffs and all of the plaintiffs from De Aguilar I were included, and the plaintiffs still said that this was only a partial listing and that additional survivors would be named. Plaintiffs plainly have failed to meet the requirements of Texas law to limit the damages recoverable to the estate in this case. As a result, plaintiffs have failed to defeat removal jurisdiction.[16]

The judgment of the district court dismissing the complaint is AFFIRMED.

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[16]As this issue is dispositive, we find it unnecessary to address the issue of Boeing's third party complaint.

APPENDIX D

CAUSE NO. B-144,222

ALMA TORREBLANCA de AGUILAR, REPRESENTATIVE OF THE ESTATE OF DAVID ALBERTO AGUILAR CHAVEZ, DECEASED; IRENE de la LLATA VDA de ANZALDUA de la LLATA, DECEASED; ING. HERNAN BARRIOS, AS REPRESENTATIVE OF THE ESTATE OF MARIA GUADALUPE de la CARIDAD BARRIOS AVILES, DECEASED; JORGE FEDERICO ALTSCHULER CASTRO, AS REPRESENTATIVE OF THE ESTATES OF PILAR MENA DE ALTSCHULER DECEASED; MIRIAM ALTSCHULER MENA, DECEASED; ROQUE BAUTISTA FAJARDO, AS REPRESENTATIVE OF THE ESTATE OF MARIA ESTELA BAUTISTA ABARCA, DECEASED; SARAI HERNANDES BAUTISTA, DECEASED; AND DALIA HERNANDES BAUTISTA, DECEASED; AND ANA MARIA ESPERANZA CUELLAR	§	IN THE DISTRICT COURT OF JEFFERSON COUNTY, TEXAS 60th JUDICIAL DISTRICT

de BOURLON, AS §
REPRESENTATIVE OF §
THE ESTATE OF MARIA §
EMILIA BOURLON §
CUELLAR, DECEASED; §
ADELA CESPEDES de §
CORTINA, AS §
REPRESENTATIVE OF §
THE ESTATE OF MARIA §
del REFUGIO CORTINA §
CUELLAR, DECEASED; §
EDUARDO CALDERON AS §
REPRESENTATIVE OF §
THE ESTATE OF §
EDUARDO CALDERON §
ZAVALA, DECEASED; §
GLORIA CALDERON §
SOTOMAYOR DE §
BAUTISTA, DECEASED; §
CARLOS EDUARDO §
BAUTISTA CALDERON, §
DECEASED; AND LILIA §
BAUTISTA CALDERON, §
DECEASED, CARLOS §
de la TORRE §
DELGADILLO, AS §
REPRESENTATIVE §
OF THE ESTATE OF §
SYLVIA RIVERA PEREZ §
de la TORRE, §
DECEASED; JUAN de §
la O. GUZMAN, AS §
REPRESENTATIVE OF §
THE ESTATES OF §
HECTOR ARTURO §
de la O. §
MACIEL, DECEASED, §
YOLANDA BENITEZ §
de la O., DECEASED; §
AND HECTOR ARTURO §
de la O. BENITEZ, §

DECEASED; ESPERANZA §
ESTAVILLO DIAZ AND §
LUZ MARIA ESTAVILLO §
DIAZ, AS §
REPRESENTATIVES OF §
THE ESTATES OF §
HORACIA ESTAVILLO §
LAGUNA, DECEASED; §
MARIA de la §
LUZ DIAZ de §
ESTAVILLO, §
DECEASED; AND §
HORACIO ESTAVILLO §
DIAZ, DECEASED; §
LUIS GOMEZ DAZA §
RANGEL, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
ADELA GOMEZ §
DAZA CORTINA, §
DECEASED; MARIA §
CONCEPCION GOMEZ §
HERNANDEZ, AS §
REPRESENTATIVE OF §
THE ESTATE §
OF JESUS GOMEZ §
HERNANDEZ, §
DECEASED; AND §
TERESA HERNANDEZ §
de GOMEZ, DECEASED; §
DAVID L. JASQUI §
ELO AS §
REPRESENTATIVE §
OF THE ESTATES OF §
JACOBO JASQUI §
DEBBAH (DERBAH), §
DECEASED; RAQUEL §
NOAH de §
JASQUI, DECEASED; §
SOFIA JASQUI §
NOAH, DECEASED; §

TERESA JASQUI NOAH, §
DECEASED; AND DAVID §
JASQUI NOAH, §
DECEASED; §
JOHN EHRHARD KOHN §
CORNEJO, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
CATIA (KATIA) §
KOHN PAZ de §
HERNANDEZ, §
DECEASED; §
MARIA MONICA §
RIVERO, la §
FUENTE de LUENGAS, §
AS REPRESENTTIVE §
OF THE §
ESTATE OF PALMIRA §
de la FUENTE §
RIVERO, §
DECEASED; ALEJANDRO §
MA GUADALUPE MERINO §
CASARIN, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
OFELIA CASARIN §
ALCIBAR, §
DECEASED; JESUS §
ERNESTO MERINO §
ORTIZ, AS §
REPRESENTATIVE OF §
THE ESTATES §
OF MARGARITA §
dl TORAL MERINO, §
DECEASED; MAGARITA §
MERINO del TORAL, §
DECEASED; AND §
MONICA MERINO de §
TORAL, DECEASED; §
ING. EDEL §
OJEDA MALPICA, AS §

REPRESENTATIVE OF §
THE ESTATE OF §
LUIS ENRIQUE OJEDA §
SANTANA, DECEASED; §
GUILLERMO PIERDANT §
PEREZ, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
HIGINIO §
PERIDANT QUIROZ, §
DECEASED; MARIA §
DOLOREZ §
ROSALES DIAZ, AS §
REPRESENTATIVE OF §
THE ESTATES OF §
JULIA DIAZ §
COBIAN de §
ROSALES, DECEASED; §
AND NATAEL GERARDO §
ROSALES FLORES; §
DECEASED; DAVID §
RODRIQUEZ DIAZ, §
AS REPRESENTATIVE §
OF THE ESTATES OF §
IMELDA ZALDIVAR §
MORENO de §
RODRIQUEZ, §
DECEASED; ANABEL §
RODRIQUEZ ZALDIVAR, §
DECEASED; MA §
GABRIELA RODRIQUEZ §
ZALDIVAR, DECEASED; §
JOSEFINA ROMERA de §
MATAGNE, AS §
REPRESENTATIVE OF §
THE ESTATE OF §
GENOVENA §
BAUMGARTEN de §
BAUMGARTEN, §
DECEASED; MARIA §
TERESA SANTOS §

MUNOZ de CASTRO, §
AS REPRESENTATIVE §
OF THE ESTATE OF §
AGUSTIN CASTRO §
DIAZ, DECEASED; §
DELFINA GRACIELA §
TOVAR VDA de SOSA, §
AS REPRESENTATIVE §
OF THE ESTATE OF §
ENRIQUE ALEJANDRO §
SOSA ROJAS, §
DECEASED; LIC §
FERNANDO YZUNZA §
BRENA, AS §
REPRESENTATIVE §
OF THE ESTATE §
OF FEDERICO §
YZUNZA BRENA, §
DECEASED; CAROLINA §
HUITRON §
ESPINOZA de YTUARDE §
AS REPRESENTATIVE §
OF THE ESTATE §
OF AGUSTIN YTUARDE §
SALAZAR, DECEASED §
OCTAVIO QUESNEL §
AND GRACIELA GALVAN §
de QUESNEL, AS §
REPRESENTATIVES OF §
THE ESTATE OF §
OF AMELA FLORENCIA §
QUESNEL GALVAN, §
DECEASED; MONICA §
COWLAND, AS §
REPRESENTATIVE §
OF THE ESTATE §
OF PETER MILES §
COWLAND, DECEASED; §
SOFIA LARTILLEUX §
AS REPRESENTATIVE §
OF THE ESTATES §

OF AYMERIC J. §
LARTILLEUX, §
DECEASED, CHANTAL §
LARTILLEUX, §
DECEASED; ELIZABETH §
LARTILLEUX, §
DECEASED; ERIC §
LARTILLEUX, §
DECEASED; PIERRE §
LARTILLEUX, §
DECEASED, VIRGINIA §
LARTILLEUX, §
DECEASED, XAVIER §
LARTILLEUX, §
DECEASED; AND §
PIERRE LARTILLEUX, §
JR., DECEASED; §
PAUL RENEE PIAGET, §
AS REPRESENTATIVE §
OF THE ESTATE §
OF PHILIP LEWIS §
PIAGET RHORER, §
DECEASED; JAMIE §
GUZMAN VAZQUEZ, §
AS REPRESENTATIVE §
OF THE ESTATE OF §
ANA ROSA GUZMAN §
FLORES, DECEASED; §
CARLOS ALBERTO §
GUADARRAMA, SR. §
AS REPRESENTATIVE §
OF THE ESTATE OF §
CARLOS ALBERTO §
GUADARRAMA, §
DECEASED; DR. §
ROBERTO PINO §
LOZANO, AS §
REPRESENTATIVE §
OF THE ESTATE §
OF HAYDEE LOZANO §
de PINON, DECEASED; §

DR. ROBERTO PINON LOZANO AS REPRESENTATIVE OF THE ESTATE OF ROBERTO PINON PEREZ DECEASED; AND JAMIE CUKIER AS REPRESENTATIVE OF THE ESTATES OF GOLD SHVEID DE CUKIER, DECEASED; ABRAHAM CUKIER SHVEID, DECEASED; ILAN CUKIER SHVEID, DECEASED; AND URI CUKIER SHVEID, DECEASED	§
PLAINTIFFS.	§
VS.	§
THE BOEING COMPANY, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, DELTA AIR LINES, INC., AND PARKER HANNIFIN CORPORATION,	§
DEFENDANTS.	§

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs bring this action as

personal representatives of the estates of each decedent named below, in their capacity as representatives of the estates of the decedent and complain of the Boeing Company, The B.F. Goodrich Company, The Goodyear Tire & Rubber Company, Delta Air Lines, Inc. and Parker-Hannifin Corporation, Defendants, and for cause of action would show unto the Court the following:

I.

Plaintiffs bring this suit pursuant to Section 71.031 of the Texas Civil Practices and Remedies Code which allows citizens of a foreign country to maintain a survival cause of action in the courts of Texas. Plaintiffs have complied with all procedural and substantive requisites of Section 16.064 of the Texas Civil Practices and Remedies Code which allows for tolling of the applicable statute of

limitations period upon dismissal of an action due to lack of jurisdiction. Plaintiffs are representatives of the estates of descendants and bring this action pursuant to Section 71.021 of the Texas Civil Practices and Remedies Code, commonly known as the Survival Statute. Their names and relationship to decedent are as follows:

DECEDENT	REPRESENTATIVE	RELATION TO DECEDENT
David Alberto Aguilar Chavez	Alma Torreblanca Aguilar	Wife
Carmen Anzaldua de la Llata	Irene de la Llata VDA de Anzaldua	Mother
Maria Guadalupe de la Caridad	Ing. Hernan Barrios	Brother
Pilar Mena de Altschuler	Jorge Federico Altschuler Castro	Husband
Miriam Altschuler Mena	"	Father
Alejandro Altschuler Mena	"	Father

Maria Estela Bautista Abaraca	Roque Bautista Fajardo	Brother
Sarai Hernandes Bautista	"	Uncle
Dalia Hernandes Bautista	"	Uncle
Maria Emilia Bourlon Cuellar	Ana Maria Esperanza Cullar de Bourion	Mother
Maria del Refugio Cortina Cuellar	Adela Cespedes de Cortina	Mother
Eduardo Calderon Zavala	Eduardo Calderon Sotomayor	Father
Gloria Calderon Sotomayor de Bautisa	"	Brother
Carlos Eduardo Bautista Calderon	"	Uncle
Lilia Bautista Calderon	"	Uncle
Sylvia Rivera Perez de la Torre	Carlos de la Torre Delgadillo	Husband
Hector Arturo de la O. Maciel	Juan de la O. Guzman	Father
Yolanda Benitez de la O.	"	Father-in-Law
Hector Arturo de la O. Benitez Sister	"	Grandfather

Horacia Estavillo Laguna	Experanza Estavillo Diaz	Daughter
Maria de la Luz Diaz de Estavillo	Luz Maria Estavillo Diaz	Daughter
Horacio Estavillo Diaz	"	Sister
Adela Gomez Daza Cortina	Luis Gomez Daza Rangel	Father
Jesus Gomez Hernandez	Maria Concepcion Gomez Hernandez	Daughter
Teresa Hernandez de Gomez	"	Daughter
Jacobo Jasqui Derbah (Debbah)	David L. Jasqui Elo	Father
Raquel Noah de Jasqui	"	Father-in-Law
Sofia Jasqui Noah	"	Grandfather
Teresa Jasqui Noah	"	"
David Jasqui Noah	"	"
Catia (Katia) Kohn Paz de Hernandez	John Ehrhard Cornejo	Father
Palmira de la Fuente Rivero	Maria Monica la Fuente de Luengas	Daughter
Ofelia Casarin Alcibar	Alejandro MA Guadalupe Merino Casarin	Daughter

Margarita del Toral Merino	Jesus Ernesto Merino Ortiz	Husband
Margarita Merino del Toral	"	Father
Celia Merino del Toral	"	Father
Monica Merino del Toral	"	Father
Luis Enrique Ojeda Santana	Ing. Edel Ojeda Malpica	Father
Higinio Pierdant Quiroz	Guillermo Pierdant Perez	Uncle
Julia Diaz	Maria Dolorez Rosales Diaz	Daughter
Natael Gerardo Rosales Flores	"	"
Imelda Zaldivar Moreno de Rodriquez	David Rodriquez Diaz	Husband
Anabel Rodriquez	"	Father
MA Gabriela Rodriguez Zaldivar	"	Father
Genoveva Baumgarten de Baumgarten	Josefina Romerro de Matagne	Niece
Agustin Castro Diaz	Maria Teresa Santos Munoz de Castro	Wife
Enriquie Alejandro Sosa Rojas	Delfina Graciela Tovar VDA de Sosa	Wife

Federico Yzunza Brena	LIC Fernando Yzunza Brena	Brother
Agustin Ytuarde Salazar	Carolina Huitron Expinoza de Ytuarde	Wife
Amelia Florencia Quesnel Galvan	Octavio Quensel	Father
"	Graciela Galvan de Quesnel	Mother
Peter Miles Cowland	Monica Cowland	Wife
Aymeric J. Lartilleux	Sofia Lartilleux	
Chantal Lartilleux	"	
Elizabeth Lartilleux	"	
Eric Lartilleux	"	
Pierre Latilleux	"	
Virgina Lartilleux	"	
Xavier Lartilleux	"	
Natalie Lartilleux	"	
Pierre Lartilleux, Jr.	"	
Philip Lewis Piaget Rhorer	Paul Renee Piaget	
Ana Rosa Guzman Flores	Jaime Guzman Vazquez	
Carlos Alberto Guadarrama	Carlos Alberto Guadarrama, Sr.	Father

Haydee Lozano de Pinon	Dr. Roberto Pinon Lozano	Son
Roberto Pino Perez	"	Son
Gold Shveid de Cukier	Jaime Cukier	Husband
Abraham Cukier Shveid	"	Father
Ilan Cukier Shveid	"	Father
Uri Cukier Shveid	"	Father

II.

Defendant, The Boeing Company, is a Delaware Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

Defendant, The B.F. Goodrich Company, is a New York Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

Defendant, The Goodyear Tire & Rubber

Company, is an Ohio Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

Defendant, Delta Air Lines, is a Delaware Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

Defendant, Parker-Hannifin Corporation, is an Ohio Corporation registered to do business in the state of Texas, and may be served with process by serving C.T. Corporation System, 350 North St. Paul, Dallas, Texas 75201.

III.

On or about March 31, 1986, all of the above decedents were aboard a Boeing B-727-264, Mexicana Airlines Flight 940,

when it crashed shortly after its takeoff from Mexico City due to a combination of brake system failure, deboost valve failure and tire explosion and killed all persons aboard. The subject aircraft was manufactured by the Boeing Company. Defendant B.F. Goodrich Tire and Rubber Company manufactured tires and other component parts of thE subject aircraft. Defendant Delta Air Lines, Inc. maintained, or was the successor corporation to the entity which maintained, the subject aircraft's landing gear and brakes. Defendant Parker-Hannifin Corporation manufactured, or was the successor corporation which manufactured component parts, including reduction valves or deboost valves for the brake assembly hydraulic system, of the subject aircraft.

IV.

Plaintiffs would show that Defendants were in the business of designing, marketing, testing, selling and placing into the stream of commerce aircraft and component parts of aircraft such as the one involved in this incident and, as a result, had a duty to make certain that such products were not defective. The aircraft involved in this incident, however, was in a defective condition and was unreasonably dangerous at the time that it was manufactured, sold distributed and otherwise placed into the stream of commerce by Defendants. Plaintiffs would show that the aircraft's manufacture and/or design defects were a producing cause of the occurrence in question subjecting Defendants to liability as set forth in Section 402A of the Restatement of Torts (Second). Plaintiffs would

further show that Defendants warranted and represented that this product, including each component, was proper, safe, and suitable for its intended purpose and use. However, Defendants breached such warranties and representations, both implied and expressed, subjecting said Defendants to liability for breach of the same and to strict liability as set forth in Section 402B of the Restatement of Torts (Second).

V.

Plaintiff would show that the aircraft involved in this litigation was unsafe for its intended purposes, and therefore defective, at the time it left the control of Defendants. The aircraft was defectively designed, manufactured, and unreasonably dangerous in that its design incorporated an inadequate, inappropriate, and/or defective tire.

Further, the design of the aircraft did not incorporate any sort of accommodation which would prevent catastrophic failure of the aircraft in the event of a tire explosion. Plaintiffs, therefore, invoke the doctrine of strict liability as set forth in Section 402A of the Restatement of Torts (Second). Plaintiffs would further show that the defects in design and manufacture were a producing cause of their injuries and damages as set forth below.

VI.

Plaintiffs would show that the component parts, including the tire which exploded and the pressure reduction valves (deboosters) of the brake system were themselves defective and unsafe for their intended purposes at the time they left the control of Defendants. Therefore, Plaintiffs invoke the doctrine of strict

liability as set forth in Section 402A of the Restatement of Torts (Second). Plaintiffs would further show that this defect in design was a producing cause of the injuries and damages set forth below.

VII.

Plaintiffs would show that the design and manufacture of the aircraft and the component parts involved in this incident were defective in that instructions, manuals, sales brochures and sales materials failed to give adequate warnings of the hazard of aircraft and passengers should the aircraft's tires be filled with air as opposed to nitrogen. Plaintiffs would further show that this defect was a producing cause of their injuries and damages set forth below.

VIII.

Defendant expressly and impliedly warranted to the public generally that the

aircraft and component parts involved in this incident were of merchantable quality and were safe and fit for their intended purposes and used under ordinary conditions and in an ordinary manner. Plaintiffs' decedents relied upon these warranties and suffered the injuries and damages set forth below as proximate result of the breach of these warranties.

IX.

Plaintiffs would show that Defendants were negligent in that they failed to warn that the tire involved in this incident would tend to explode when filled with air rather than nitrogen. Plaintiffs would further show that the Defendants' negligence in this regard was a producing cause of the injuries and damages set forth below.

X.

Plaintiffs would show that Defendants

were negligent in failing to warn, instruct and safety check the subject aircraft's brake, wheel, wheel-well compartment, fuel lines, and hydraulic lines and other components of the subject aircraft away from the hazard created by a foreseeable tire explosion. Plaintiffs would further show that Defendants' negligence in this regard was a producing cause of the injuries and damages set forth below.

XI.

Plaintiffs would show that Defendants were negligent in failing to inspect and test the aircraft and component parts involved in this incident before making it available for use by the public. Had proper inspection been made, the defects and dangers inherent in the aircraft would have, in all likelihood, been discovered.

XII.

Plaintiffs would show that Defendants were negligent in failing to adequately maintain the aircraft involved in this incident. Had the aircraft been properly maintained, the defects and dangers inherent in the aircraft would have, in all likelihood, been discovered.

XIII.

Plaintiffs would show that Defendants were negligent in the design of the aircraft involved in this incident. Had the aircraft been designed to prevent catastrophic failure in the event of a tire explosion, in all likelihood the subject incident would have been prevented. All of the above acts and omissions of negligence and the design, manufacturing, and/or marketing defects on the part of these Defendants were a proximate cause of the incident in

question which resulted in Plaintiffs' injuries and damages as set forth below.

XV.

As a direct and proximate result of the negligent acts, omissions, failure, and conditions created by Defendants in the defective and unreasonably dangerous condition of the aircraft made the basis of Plaintiffs' lawsuit, decedents suffered the following damages:

1) The above-named decedents, during the flight of the subject aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering, the value of which will not exceed $50,000 per decedent.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and on final

trial, Plaintiffs have:

1) Judgment against Defendants for a sum not to exceed $50,000 per decedent exclusive of interest and court costs;

2) Prejudgment and post-judgment interest as provided by law;

3) Costs of suit.

Plaintiffs further attach an affidavit of Dennis Reich clearly stating that each decedent's damages are within the jurisdictional amounts of the County Court at Law of Jefferson County, Texas and that each decedent's damages do not exceed $50,000 exclusive of interest and court costs. Dennis Reich's affidavit is attached hereto as Exhibit "A" and incorporated herein as if set forth herein.

Respectfully submitted,

Weller, Wheelus & Green
P.O. Box 350
Beaumont, TX 77704-0350
(409) 838-0101
(409) 838-6780 (Fax)

BY: /S/
MITCHELL A. TOUPS
STATE BAR NO. 20151600

BY: /S/
DENNIS REICH
STATE BAR NO. 16739600
4265 San Felipe
Suite 620
Houston, TX 77027

ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiff respectfully request a trial by jury.

BY: /S/
MITCHELL A. TOUPS

A F F I D A V I T

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared DENNIS C. REICH, who, being by me here and now duly sworn, deposed and says as follows:

"My name is DENNIS C. REICH. I am over twenty-one years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the attorney for each Plaintiff identified in the preceding Petition. I hereby judicially admit that each claim on behalf of each decedent I represent as a result of the crash of the Boeing 727-S64, Mexican Airlines, Flight 944, is less than fifty thousand dollars ($50,000.00) exclusive of interest and court costs.

Each decedent hereby irrevocably agrees that the amount of damages claimed on their behalf in this action will forever be less than fifty thousand dollars ($50,000.00) exclusive of interest and court costs. Plaintiffs hereby irrevocably agrees to the entry of an order of court which places an irrevocable cap upon the amount of damages which may be sought by or awarded to Plaintiffs in this case. This cap should be set as fifty thousand dollars ($50,000.00) exclusive of interest and court costs.

Plaintiffs agree, acknowledge, and understand that this stipulation is binding upon them and cannot rescinded or revoked under any circumstances regardless of any developments which may occur during the investigation, discovery, pretrial or trial of this action.

I have personal knowledge of each

fact set forth herein and they are true and correct"

/s/
DENNIS C. REICH

SUBSCRIBED AND SWORN TO before me by the said DENNIS C. REICH on this 28th day of October, 1992, to certify which witness my hand and seal of office.

NOTARY PUBLIC,
STATE OF TEXAS

My Commission Expires:

8/22/96

Marilyn A. Kincaid
Typed of Printed
Name of Notary

APPENDIX E

PINON LOZANO AS REPRESENTATIVE OF THE ESTATE OR ROBERTO PINON PEREZ, DECEASED; AND JAIME CUKIER, AS REPRESENTATIVE OF THE ESTATES OF GOLD SHVIED de CUKIER, DECEASED; ABRAHAM CUKIER SHVEID, DECEASED; ILAN CUKIER SHVEID, DECEASED; AND URI CUKIER SHVEID, DECEASED	§
PLAINTIFFS.	§
VS.	§
THE BOEING COMPANY, THE B.F. GOODRICH COMPANY, THE GOODYEAR TIRE AND RUBBER COMPANY, DELTA AIR LINES, INC. AND PARKER HANNIFIN CORPORATION,	§
DEFENDANTS.	§

DEFENDANTS' NOTICE OF REMOVAL

TO: CLERK, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

AND TO: PLAINTIFFS ALMA TORREBLANCA DE AGUILAR, ET AL;

AND TO: DENNIS C. REICH, ATTORNEY AT LAW
4265 San Felipe, Suite 620
Houston, TX 77027
Plaintiffs' Attorney

AND TO: MITCHELL A. TOUPS
WELLER, WHEELUS & GREEN
550 Fannin 5th Floor
Beaumont, TX 77701

COME now defendants The Boeing Company, The B.F. Goodrich Company, The Goodyear Tire and Rubber Company, Delta Air Lines, Inc., and Parker Hannifin Corporation and hereby give notice of removal of the above-captioned action, and in support thereof state as follows:

BASIS FOR REMOVAL

I.

This is a civil action arising from the crash of Mexicana Airlines Flight 940 in the mountains west of Mexico City on March 31, 1986. The civil action was filed in the District Court of Jefferson County, Texas on November 5, 1992, and assigned Cause No. B-144,222. The 38 named plaintiffs assert that they are the "personal representatives of the estates"

of 69 passengers killed in the crash. Plaintiffs' Original Petition alleged negligence and product liability claims on behalf of those 38 named plaintiffs against The Boeing Company, The B.F. Goodrich Company, the Goodyear Tire and Rubber Company, Delta Air Lines, Inc. and Parker Hannifin Corporation.

II.

On information and belief, none of the plaintiffs are citizens of any state of the United States; all are foreign nationals residing outside the United States, primarily in Mexico. Pursuant to 28 U.S.C. § 1332(c)(2), the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same state as the decedent. On information and belief, none of the decedents whose estates are represented by plaintiffs were citizens of any state of

the United States; like the plaintiffs, all decedents were foreign nationals residing outside the United States, primarily in Mexico.

III.

The defendants are citizens of the following states:

Defendant	State of Incorporation	Principal Place of Business
Boeing	Delaware	Washington
B.F. Goodrich	New York	Ohio
Goodyear Tire	Ohio	Ohio
Delta Air Lines	Delaware	Georgia
Parker Hannifin	Ohio	Ohio

None of the defendants is a citizen of Texas.

IV.

On a reasonable reading of the record, each claim on behalf of a decedent's estate involves an amount in controversy in excess of $50,000.00 exclusive of interest and costs. Plaintiffs' claims are based on § 71.021

of the Texas Civil Practices & Remedies Code, commonly known as the Survival Statute. Plaintiffs claim that the decedents, "during the flight of the aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering." The nature of the damages alleged is such that a judgment in excess of $50,000 per decedent, exclusive of interest and costs, is a reasonably possibility.

V.

Plaintiffs' purport to limit the amount in controversy by stating in their petition that the value of the damages sought by each decedent's estate will not exceed $50,000 and by appending to the petition an affidavit of plaintiffs' attorney stating that each claim on behalf of each decedent is for less than $50,000 exclusive of interest and court costs.

However, as detailed below, despite an allegation in the petition that "[p]laintiffs bring this action as personal representatives of the estates of each decedent named below," none of the plaintiffs have in fact been appointed as personal representatives of the estate of the decedent(s) whose rights they purport to represent. Thus, no plaintiff has the authority to limit the substance or amount of claims on behalf of the decedent's estates. Plaintiffs' attempts to do so are meaningless and must be disregarded in determining the amount in controversy in this matter.

VI.

By letter dated November 25, 1992, counsel for defendant The Boeing Company tendered an affidavit to plaintiffs' attorney, Dennis C. Reich, for his signature, asking him to confirm, among

other things, that plaintiffs had the necessary authority to limit the claims of each decedent's estate to no more than $50,000, and that plaintiffs' attorneys had been authorized by plaintiffs to make a binding admission on their behalf. A copy of the letter and accompanying affidavit is Attachment 1 to the Affidavit of Howard L. Close, which is attached hereto as Exhibit A. The proposed affidavit requested plaintiffs' attorney to attest in pertinent part that:

> Each Plaintiff identified in the Petition in this matter has been appointed by a qualified court as a personal representative of the estate(s) of the decedent(s) whose rights he or she purports to represent.

Proposed Affidavit, Attachment 1 to the affidavit of Howard L. Close, Exhibit A hereto.

VII.

On or about December 4, 1992,

plaintiffs' attorney, Mitchell A. Toups, advised counsel for defendant The Boeing Company, Howard L. Close, that plaintiffs' attorneys could not sign the affidavit in the form tendered by Boeing because (1) none of the plaintiffs had been appointed as personal representatives of the estate of the decedent(s) whose rights they purported to represent (even though Plaintiffs' Original Petition alleged that each plaintiff had this status); and (2) none of plaintiffs' attorneys in this action (including Mr. Reich, who executed the affidavit appended to Plaintiffs' Petition) had actually communicated with plaintiffs on any of these subjects; their information come solely from attorneys in Mexico. Affidavit of Howard L. Close ¶ 4. Plaintiffs' attorneys sent counsel for defendant Boeing handwritten revisions to the proposed affidavit, whereby they

proposed to delete in its entirety the statement that each plaintiff has been appointed by a qualified court as a personal representative of the estate of the decedent(s) whose rights he or she purports to represent as well as to delete any referenced to each plaintiff having "expressly" authorized plaintiffs' attorneys to limit the amount of damages claimed, or to plaintiffs having confirmed "to me [Mr. Reich]" that they understood they were making an irrevocable commitment. A copy of plaintiffs' handwritten revisions to the proposed affidavit is Attachment 2 to the Affidavit of Howard L. Close, Exhibit A hereto.

VIII.

Since plaintiffs were not at the time Plaintiffs' Original Petition was filed, and are not now, properly appointed personal representatives of the estates of

the decedent(s) whose rights they purport to represent, neither plaintiffs, nor plaintiffs' attorneys, have the authority to limit the amount claimed by the estate of any decedent. The purported agreement of plaintiffs and their attorneys to limit the damages sought is meaningless and has no bearing on the amount in controversy in this matter.

IX.

Based on the foregoing facts, this Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332. Removal of this action is therefore proper under 28 U.S.C. § 1441(a), which authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction....," and 28 U.S.C. § 1441(b).

TIMELINESS OF REMOVAL

X.

A copy of the citation and Plaintiffs' Original Petition ("The Complaint"), the initial pleading setting forth plaintiffs' claim for relief, were served upon each defendant in this action on November 12, 1992. Certified copies of the citations (reduced in size) and the complaint as well as the docket sheet and all pleadings filed in the state court as well as the docket sheet and all pleadings filed in the state court are attached as Exhibit "B" pursuant to 28 U.S.C. § 1446(a). Because this Notice of Removal is being filed within 30 days after service of the complaint, removal is timely under 28 U.S.C. § 1446(b).

VENUE OF REMOVED ACTION

XI.

Because this Court is the United

States District Court for the district and division embracing the place where the state court action is pending, it is the appropriate court for removal under 28 U.S.C. § 1441(a).

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was forwarded to all counsel of record on this the 11th day of December, 1992.

Respectfully submitted,

/s/

Howard L. Close
State Bar #04406500
ORGAIN, BELL & TUCKER, L.L.P.
470 Orleans Street
Beaumont, TX 77701
(409) 838-6412
FAX 409/838-6959

ATTORNEYS FOR DEFENDANT,
THE BOEING COMPANY

/s/

Gerald L. Bracht
TX Bar No. 02806000
MAYOR, DAY, CALDWELL & KEETON, L.L.P.
1900 NCNB Center
700 Louisiana
Houston, TX 77002
(713) 222-7035
FAX # 713-225-7047

ATTORNEYS FOR DEFENDANTS, THE B.F. GOODRICH COMPANY AND THE GOODYEAR TIRE AND RUBBER COMPANY

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALMA TORREBLANCA DE AGUILAR, ET AL	§	
	§	
VS.	§	CIVIL ACTION
THE BOEING COMPANY, ET AL.	§	NO. 1-92CV-014

AFFIDAVIT OF GUADALUPE BISTRAIN

BEFORE ME, the undersigned authority, on this day personally appeared GUADALUPE BISTRAIN, who after being be my first duly sworn, stated upon her oath as follows:

> "My name is GUADALUPE BISTRAIN. I am over the age of 18 years of age and am personally knowledgeable about the facts set out in this affidavit. I am an attorney licensed to practice law in the Country of Mexico, and have never been convicted of a felony or a crime of moral turpitude.
>
> I am the Mexican counsel for all Plaintiffs identified in Plaintiff's Original Petition. I have received explicit authority from each of the plaintiffs named in the above-captioned lawsuit to limit their damages to no more than FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00)(U.S. Currency) per

decedent, exclusive of court costs and interests. Each of the named plaintiffs identified in the above-captioned lawsuit are authorized to sue in their capacity as an heir at law and/or personal representative for each of the respective decedents identified in Plaintiffs Original Petition filed under the style and cause number referenced above.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

Executed this 2nd day of March, 1993.

/s/
GUADALUPE BISTRAN

STATE OF TEXAS §
§
COUNTY OF JEFFERSON §

AFFIDAVIT

Before me, the Undersigned Authority, personally appeared Mitchell A. Toups, who being by me duly sworn, deposes and says as follows:

> "My name is Mitchell A. Toups. I am of over 21 years of age, of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein stated:
>
> I am an attorney with the law firm of WELLER & GREEN, L.L.P., 550 Fannin Street, Beaumont, TX 77701. I am an attorney of record in the case entitled Alma Torreblanca de Aguilar, et al v. The Boeing Company, et al. On or about December 4, 1992, I had a telephone conversation with Howard Close, attorney for the Boeing Company. Mr. Close and I had a conversation about an affidavit which he wanted Dennis Reich to sign so that they could be protected from a later amendment as to damages. I informed Mr. Close that it was not necessary for each plaintiff to have been appointed by a qualified court as personal representative of the estate since an heir of the estate can bring forth the claims of the

decedent. I further advised Mr. Close that whether or not the individual is the rightful individual to bring a survivalship cause of action has nothing to do with the amount in controversy."

"The above referenced facts are based on personal knowledge and are true and correct."

/s/

MITCHELL A. TOUPS

SWORN TO AND SUBSCRIBED by me on this 1ST day of February, 1993, to certify which witness my hand and seal of office.

NOTARY PUBLIC-STATE OF TEXAS

APPENDIX G

STATUTE 1332
DIVERSITY OF CITIZENSHIP;
AMOUNT IN CONTROVERSY; COSTS

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section

1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Feral courts is fully adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the

estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(June 25, 1948, c. 646,62 Stat.930; July 25, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 4, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, 201(a), 202(a), 203(a), 102 Stat. 4646).